



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 857 OF 2012

JOHN MWANGI KANYI.....PLAINTIFF

VERSUS

JOHN MUTUNGA MWANGI.....DEFENDANT

-consolidated with-

NAIROBI ELC CASE NO 513 OF 2007

JUDGMENT

Introduction

1. This judgment relates to two suits; (i) Nairobi ELC Case Number 513 of 2007; and (ii) Nairobi ELC Case Number 857 of 2012. The dispute in the two suits revolves around the ownership of a plot situated in Umoja 1. I will outline the background to the two suits before summarizing the parties' respective evidence and submissions. I will thereafter make my brief analysis and determination on the key issues falling for determination in the two suits.

Nairobi ELC Case Number 513 of 2007

2. On 5/2/2002, the Plaintiff, John Mwangi Kanyi, through a plaint of even date, brought Nairobi High Court Civil Case Number 202 of 2002 against the City Council of Nairobi, contending that the Council was unlawfully interfering with his property described as **Plot Number M75.1 Umoja 1 Infills** (the **suit property**). His case was that the Council allocated to him the suit property on 18/1/1994 and he had fully complied with the requirements of the allocation. He further contended that the Council had sent surveyors to resurvey the property with a view to allocating a portion of the property to other persons. Consequently, he sought the following verbatim orders against the Council:

a) A permanent injunction restraining the defendant by its agents, servants or allottees from trespassing, repossessing or interfering with possession of Plot No. M75.1 Umoja 1 Infills.

b) Damages.

c) Costs of the suit.

d) Any other relief this honourable court may deem fit and just to grant.

3. Through a statement of defence dated 22/3/2002 and filed on even date, the Council denied the plaintiff's claim and contended that the suit property was never allocated to the plaintiff lawfully. It further contended that the allocation of the suit property to the plaintiff was irregularly obtained and the allotment letter was procured illegally, irregularly and fraudulently. The Council itemized various particulars of fraud.

4. Subsequently, on 2/3/2005, parties to Nairobi HCC No 202 of 2002 filed a statement of agreed issues itemizing the following as the agreed issues falling for determination by the Court:

a) Was the plaintiff lawfully allocated Plot No. M75.1 Umoja 1 Infills by the defendant?

b) Has the defendant or its servants unlawfully interfered with the plaintiff's occupation of the said plot?

c) Is the plaintiff entitled to the orders sought?

d) What order as to costs?(sic)

5. Upon establishment of the Land and Environment Division of the High Court, Nairobi High Court Civil Case Number 202 of 2002 was designated as Nairobi High Court Environment and Land (EL) Case Number 513 of 2007. Further, upon promulgation of the 2010 Constitution and the subsequent establishment of the Environment and Land Court of Kenya, this case was transferred to the new Court (the Environment and Land Court) and designated as Nairobi ELC Case No. 513 of 2007. On 23/7/2013, Gitumbi J issued an order consolidating the said suit with Nairobi ELC Case No 857 of 2012. She further designated Nairobi ELC Case No 857 of 2012 as the lead file.

6. Subsequent to that, Mr Peter Waweru Mutunga brought a notice of motion dated 6/11/2012 seeking to be joined as a defendant in the suit. The application came up before Mutungi J on 28/1/2013 when counsel for the applicant informed the court that the application had not been served. It does appear from the court record that the application was never pursued.

Nairobi ELC Case No. 857 of 2012

7. On 20/11/2012, the plaintiff, John Mwangi Kanyi, brought Nairobi High Court ELC Case Number 857 of 2012 against John Mutunga Mwangi, contending that the latter had unlawfully and without any just cause invaded the suit property, demolished the plaintiff's structures thereon, and commenced excavation and construction on the suit property. He sought the following verbatim orders against John Mutunga Mwangi:

- 1. A declaration that the plaintiff is the lawful owner of Plot No. M75.1 Umoja 1 Infills.**
- 2. A permanent injunction restraining the defendant by himself, his servants or gents from entering, remaining in or interfering with the plaintiff's occupation of Plot No. M75.1 Umoja 1 Infills.**
- 3. Mesne profits at a rate of Kshs. 30,000 per month from 17th October 2012 until date of judgment.**
- 4. Kshs. 500,000 being value of demolished structures.**

8. On 20/3/2013, John Mutunga Mwangi filed a statement of defence in which he contested the plaintiff's claim of ownership of the suit property. He further contended that he was the owner of the suit property which he described as Plot No CS 81 Umoja. He added that he commenced construction works on the suit property after he obtained approvals from the City Council of Nairobi. He acknowledged existence of Nairobi High Court ELC Case Number 513 of 2007 between the plaintiff and the Council and admitted that it related to the same subject matter. He urged the court to dismiss the plaintiff's suit.

9. Parties to the second suit subsequently filed a statement of agreed issues itemizing the following as the issues falling for determination in the second suit:

- a) Is the plaintiff the lawful owner of Plot No. M75.1 Umoja 1 Infills.**
- b) Is the defendant the lawful owner of plot No CS 81 Umoja Infill's?**
- c) Are the two plots namely Plot No. M75.1 Umoja 1 Infills. and CS 81Umoja 1 Infill's in the same physical location?**
- d) Has either the plaintiff or the defendant encroached on each other's plot?**
- e) Has either of the parties suffered any loss and is entitled to damages?**
- f) Who is to pay costs?**

10. On 24/10/2017, the City Council of Nairobi was substituted with the Nairobi City County. John Mwangi Kanyi remained the plaintiff in the two suits. John Mutunga Mwangi was designated as 1st defendant for the purpose of the consolidated proceedings while the County Government was designated as 2nd defendant for the purpose of identification in the consolidated proceedings.

Plaintiff's Evidence

11. Hearing commenced before me on 30/5/2018. The plaintiff testified as PW 1. He adopted his written witness statement as his sworn evidence in chief. His testimony was that on 6/12/1985, the Nairobi City Commission issued him with a temporary occupation licence authorizing him to occupy the suit property and utilize it as an open air garage. Subsequently, on 11/8/1992, he applied to the Director of Housing at the Nairobi City Commission for a permanent allocation. On 18/1/1994, the Nairobi City Council allocated to him the suit property which was designated as **Plot No M 75.1 Umoja 1 Infills** and he duly paid all the charges demanded by the Council. On 26/9/1996, he was issued with a beacon certificate. He subsequently erected temporary structures on the suit property which he rented to various tenants.

12. The plaintiff further testified that in June 2001, surveyors from the City Council of Nairobi visited the suit property and purported to resurvey the property. On inquiring from the Council, he was informed that the Council had decided to subdivide the suit property and the Council demanded that he surrenders ½ of the suit property. The actions and demands of the Council prompted him to initiate Nairobi High Court Civil Suit Number 202 of 2002 which is now designated as Nairobi ELC Case No 513 of 2007.

13. The plaintiff added that on the night of 16th and 17th October 2012, John Mutunga Mwangi descended on the suit property and demolished the structures which he had erected on the suit property. The subsequent night he commenced excavation and construction on the suit property. The activities of the said defendant prompted him to initiate Nairobi High Court Civil Case Number 857 of 2012 in which he obtained restraining orders. He produced 23 exhibits to support his case.

John Mutunga Mwangi's Evidence

14. John Mutunga Mwangi testified as DW1 and called Simon Waweru Mutunga who testified as DW2. DW1 adopted his written statement as his sworn evidence in chief. His testimony was that his son, Simon Waweru Mutunga (DW2), was allocated the suit property on 30/4/2001 and the said Simon Waweru Mutunga was the legitimate owner of the suit property which he described as CS-81 Umoja 1. He further testified that DW2 started developing the suit property on 17/10/2012 after he received approval from the City Council of Nairobi. On 19/10/2012, a group of young men invaded the plot and stopped the construction work. He then intervened and learnt that the plaintiff had instructed them to stop the construction. He subsequently met the plaintiff who informed him that he had filed a suit against the City Council. Subsequently, the plaintiff sued him.

15. His further testimony was that the land subject matter in the two suits was the same on the ground. He added that Plot Number CS 81 is situated in Umoja I and was a product of replanning and resurveying. He did not know the plot out of which the said plot was resurveyed. He further confirmed that in his defence he had stated that the suit property was the subject matter in Nairobi EIC Case Number 202 of 2002. He added that he was the one who demolished the plaintiff's structures on the suit property.

16. DW 2 - Simon Waweru Mutunga adopted his written statement as his sworn evidence in chief. His evidence was that he was a son of John Mutunga Mwangi. He was allocated Plot Number CS 81 Umoja 1 through an allotment letter dated 430/4/2001. He did not know the actual physical location of the plot he had applied to be allocated. He was taken to the plot by a surveyor. He was issued with a beacon certificate on 8/1/2009. He was not aware that the plaintiff and the City Council had a dispute over the suit property. He further stated that the plot him and the plaintiff were claiming was the same on the ground. Lastly, he stated that he did not know who was in occupation of the suit property.

17. The Nairobi City County did not file any witness statement or documents. Similarly it did not lead any evidence.

Submissions by the Plaintiff

18. The plaintiff filed his submissions on 12/11/2018. It was submitted that the plaintiff had proved ownership of the suit property by producing necessary ownership documents and had demonstrated that he had paid all the necessary charges. It was further submitted that the County Government did not adduce any evidence to controvert the plaintiff's evidence. The plaintiff added that the Nairobi City County had not tendered evidence to prove that the allotment issued to him did not originate from the Council or that the allotment letter was obtained through fraud. The plaintiff further submitted that the fact that the council accepted payment from him after the expiry the 30 days amounted to waiver of their right to cancel or withdraw the letter of allotment. It was argued that by the time the 1st defendant was being allocated Plot No. CS 81, a dispute between the plaintiff and the council existed. It was argued that the 2nd defendant purported to resurvey the suit property at a time when it belonged to the plaintiff. Lastly, it was submitted that since the plaintiff's allocation was the first in time, his rights over the suit property prevail over those of Mr Mutunga. Reliance was placed on **Joreth Limited vs Victory Faith International Church & 2 Others [2017] eKLR**. The plaintiff urged the court to grant him the prayers sought in the two suits.

Submissions by Mr Mutunga

19. Mr Mutunga filed his submissions on 5/3/2019. It was submitted that the plaintiff had lost his rights over the suit property because he did not comply with the terms and conditions of the allotment letter. It was also submitted that there was uncertainty about the suit property; there needed to be a clarification whether the plot described as M 75.1 Umoja1 Infills is the same as the one referred to as CS 81 Umoja 1. It was argued that the plaintiff relied on presumption in that he assumed that since the Council had accepted his money, he had been allocated the suit property. Mr Mutunga urged the court to dismiss the plaintiff's two suits.

20. The County Government filed written submissions dated 30/10/2018. It was submitted that the plaintiff failed to disclose to the court that he held a temporary occupation license for the suit premises. Further, it was argued that the plaintiff acquired the suit property illegally and made developments without approvals from the Council. It was further submitted that the plaintiff was in breach of the law and the terms of the lease which required him to make payments within thirty days. The County Government added that the plaintiff did not have any interest or right on the property and therefore, no remedy was available to him. Reliance was placed on **Nathan Tirop Koech vs Ezekiel Kiptoo [2017] eKLR** where it was held that an order cannot be issued where a party is relying on claims that are not pleaded or real and are only based on theories. The court in **Joseph Letuya & others vs the Attorney General & others [2014] eKLR** held that before a court can issue a declaratory order, it must be satisfied that there exists a real interest in the subject matter and that the question before court must be real and justiciable. Lastly, it was submitted that the plaintiff's rights had not been violated by the County Government and therefore, the injunctive orders sought against it were not available to the plaintiff.

Analysis & Determination

21. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. Parties to the two consolidated suits framed specific issues which they invited the court to determine. I have considered those issues. Taking into account the framed issues, the following are the five condensed issues which fall for determination in the two consolidated suits: (i) Is the property described by the plaintiff as **M75.1 Umoja 1 Infills** the same as the property described by the defendants as **CS – 81 Umoja 1** on the ground?, (ii) Whether the plaintiff is the lawful allottee/owner of the suit property; (iii) Whether John Mutunga Mwangi is the lawful owner of Plot Number CS -81 Umoja 1?; (iv) Is the plaintiff entitled to any of the prayers sought in the two suits? and (v) Who should bear costs of the two suits? I will make pronouncements on the five issues sequentially in that order.

22. The first issue is whether **Plot Number M75.1 Umoja 1 Infills** is the same as **Plot Number CS -81 Umoja 1** on the ground. The plaintiff's position was and remains that he was granted a temporary occupation licence (TOL) on 6/12/1985 and subsequently issued with a letter of allotment in respect of the suit property which was described in the letter of allotment as M75.1 Umoja 1 Infills. The plaintiff further contended that Plot Number CS-81 Umoja 1 was irregularly and illegally surveyed out of Plot Number M 75.1 Umoja 1 Infills. During cross-examination, DW1 confirmed that the two plot designations related to the same piece of land on the ground. DW1 similarly confirmed that CS -81 Umoja 1 was a product of replanning and resurveying. He further testified that he had admitted in his defence that the subject matter in Nairobi ELC 857 of 2012 and Nairobi ELC 202 of 2002 was the same on the ground.

23. DW 2 testified that he was the allottee of the Plot designated as Number CS -81 Umoja 1. He stated that on the ground, the suit property which he claimed to be his was the same piece of land which the plaintiff similarly claimed to be his, and that is the subject matter of this suit.

24. The totality of the above evidence is that the two plot designations relate to the same piece of land on the ground. My finding on the first issue therefore is that the property designated as Plot Number M75.1 Umoja 1 Infills and Plot number CS-81 Umoja 1 is one and the same on the ground. The only difference is that **Plot Number CS-81 Umoja 1** which measures approximately 0.02 hectares is part of **Plot Number M751 Umoja1 Infills** which measures 0.08 hectares.

25. The second issue is whether the plaintiff is the lawful owner/allottee of the suit property. The plaintiff produced a temporary occupation licence showing that he was authorized by the City Commission to occupy the suit property in December 1985. He also produced a letter of allotment dated 11/8/1992. No controverting evidence was tendered to challenge the plaintiff's documents of title. What emerges in this suit is that the Council purported to resurvey the suit land which it had already allocated to the plaintiff. It did so with a view to allocating a portion of it to Mr Peter Waweru Mutunga. As at that time, the plaintiff had complied with the conditions set out in the letter of allotment and was in possession of the suit property. The plaintiff promptly challenged that decision. In my view, the suit property was not available for resurvey and sub division in the manner the Council purported to act. The suit property had already been allocated to the plaintiff and could only be repossessed if the plaintiff failed to abide by the terms of the allocation. It is therefore my finding that the plaintiff is the lawful allottee and beneficial owner of the suit property, Plot Number 75.1 Umoja 1 Infills out of which Plot Number Cs -81 Umoja 1 was irregularly resurveyed. The said irregular resurvey is therefore null and void.

26. The third issue is whether John Mutunga Mwangi is the lawful owner of Plot Number CS – 81 Umoja 1. First, I have come to the finding that Plot Number CS – 81 Umoja 1 was irregularly surveyed out of Plot Number M 75. 1 Umoja 1 and legally belongs to the plaintiff as the legitimate beneficial owner. Secondly, Mr Mutunga testified as DW1 and was categorical that he was not the purported allottee of Plot Number CS – 81 Umoja 1. The purported allottee was Peter Waweru Mutunga, not John Mutunga Mwangi. My finding on the third issue therefore is that John Mutunga Mwangi is not the lawful owner of Plot Number CS – 81 Umoja 1. The said Plot is part of M 75.1 Umoja 1 Infills and belongs to the plaintiff herein.

27. The fourth issue is whether the plaintiff is entitled to any of the prayers sought in the two suits. In Nairobi ELC 513 of 2007, the plaintiff sought a permanent injunctive order and damages against Nairobi City County. He also sought costs of the suit. In Nairobi ELC of 2012, he sought a declaratory order, a permanent injunction, *mesne profits*, value of the demolished structures, security costs and costs of the suit against John Mutunga Mwangi. The plaintiff did not however lead evidence to support the claim for general and special damages. In the circumstances, no award will be made under the limbs of general and special damages. I will however grant the plaintiff the declaratory restraining orders.

28. The fifth issue relates to costs, the Council had no legitimate basis for purporting to resurvey the plaintiff's plot. Secondly, John Mutunga Mwangi admitted that he descended on the plaintiff's structures and demolished them at night. In my view, he had no basis to do that because he had no legitimate claim to the suit property. Consequently, the Nairobi City County will bear the plaintiff's costs in Nairobi ELC 513 of 2007. Mr John Mutunga Mwangi will bear the plaintiff's costs in Nairobi ELC 857 of 2012.

Disposal Orders

29. In light of the above findings, the two suits; Nairobi ELC Case Number 857 of 2012 and Nairobi ELC Case Number 513 of 2007 are disposed in the following terms in tandem with the prayers which were sought by the plaintiff in the two suits:

a) It is hereby declared that the plaintiff, John Mwangi Kanyi, is the lawful owner of Plot Number M75.1 Umoja 1 Infills.

b) A permanent injunction is hereby issued against both the Nairobi City County and Mr John Mutunga Mwangi, restraining them and their agents/servants against interfering with the plaintiff's occupation of Plot Number M 75.1 Umoja 1 Infills.

c) The plaintiff is awarded costs of the two suits against John Mutunga Mwangi in Nairobi ELC 857 of 2012 and against the Nairobi County Government in Nairobi ELCC 513 of 2007, the respective defendants in the two suits.

DATED, SIGNED AND READ AT NAIROBI ON THIS 16TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Jaoko holding brief for Mr Ochieng advocate for the defendants

